[JOINT COMMITTEE PRINT]

DESCRIPTION OF S. 70

RELATING TO AWAY-FROM-HOME EXPENSES OF MEMBERS OF CONGRESS

SCHEDULED FOR A HEARING

BEFORE THE

SUBCOMMITTEE ON TAXATION AND DEBT MANAGEMENT

OF THE

COMMITTEE ON FINANCE

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INTRODUCTION

This pamphlet provides a description of S. 70 (introduced by Senators Long, Proxmire, and Specter), pertaining to the tax treatment of away-from-home expenses of Members of Congress. The Senate Finance Subcommittee on Taxation and Debt Management has scheduled a public hearing on the bill on February 25, 1983.

The first part of the pamphlet is a summary of the bill. This is followed in the second part with a description of present law. The third part discusses the historical development of rules affecting Members of Congress. Part four is a description of the provisions of the bill.

I. SUMMARY

In general, an individual is allowed a deduction from gross income for all ordinary and necessary expenses incurred in carrying on any trade or business. Deductible expenses include reasonable and necessary travel expenses, including expenses for meals, lodging, and transportation, incurred while away from home overnight in the pursuit of a trade or business.

The deduction of travel expenses is subject to certain limitations. In general, out-of-pocket travel expenses for meals and lodgings incurred by a taxpayer are deductible only if they are (1) incurred while away from home overnight, (2) reasonable and necessary for the taxpayer's business and directly attributable to it, (3) not lavish or extravagant, (4) not reimbursable, and (5) properly substantiated. No deductions are allowed for personal, living, and family expenses except as expressly allowed under the Code.

Like other businessmen, Members of Congress may deduct ordinary and necessary business expenses, including travel expenses incurred while away from home overnight in the pursuit of a trade or business. The law provides expressly that the home of a Member of Congress for tax purposes is the Member's place of residence within the home State or district. Additionally, the amount deducted for living expenses incurred in the Washington, D.C. area by a Member of Congress may not exceed $3,000.

The bill (S. 70) described in this pamphlet would repeal all rules expressly governing the travel expenses of Members of Congress. The determination of each Member's tax home and the amount deductible for travel expenses by each Member would be determined in accordance with the general principles applicable to all taxpayers.

II. PRESENT LAW

A. Overview

General rule

In general, an individual is allowed a deduction from gross income (i.e., an "above-the-line" deduction) for all ordinary and necessary expenses incurred in carrying on any trade or business. Deductible expenses include travel expenses, such as meals, lodging, and transportation, incurred while away from home overnight in the pursuit of a trade or business (sec. 162(a)(2)).

The cost of meals includes the actual cost of food and expenses incident to preparation and serving. The cost of lodging includes rental, repairs, insurance, laundry and utilities. Lodging costs also include depreciation on a house and household furnishings owned by the taxpayer and used while away from home on business. Mortgage interest and real estate taxes are deductible under other provisions of the Code (secs. 163 and 164).

The taxpayer must substantiate both the amount and business purpose of an expense. In general, this requirement may be met by adequate records or sufficient evidence corroborating the taxpayer's statements regarding the amount, time, place, and business purpose of the expenditure.

For determining the deductibility of travel expenses, a taxpayer's home generally is considered to be located at his regular place of business or his regular place of abode in a real and substantial sense.

No deductions are allowed for personal, living, and family expenses, except as expressly allowed under the Code.

General requirements for deductibility of business expenses

The deduction of travel expenses is subject to certain limitations. In general, out-of-pocket travel expenses for meals and lodgings incurred by a taxpayer are deductible only if they are (1) incurred while away from home overnight, (2) reasonable and necessary for the taxpayer's business and directly attributable to it, (3) not lavish or extravagant, (4) not reimbursable, and (5) properly substantiated.

B. Away from Home Overnight

For travel expenses to be deductible, a taxpayer must be "away from home." The Internal Revenue Service and the Tax Court take the position that a person's tax home means the location of the taxpayer's principal place of business, and not where the taxpayer chooses to maintain his residence. Other courts have used a permanent place of abode test. The Supreme Court has yet to take a position on the issue. However, the Supreme Court has indicated that

when the employer gains nothing from the taxpayer's personal decision to reside in a different city from the place of business, the expenses are not considered to be incurred in the pursuit of business and therefore are treated as nondeductible personal expenses.[1]

If the taxpayer is regularly engaged in business at two or more separate locations, the Internal Revenue Service has ruled that the taxpayer's home is considered to be located at his principal place of business.[2] The courts have held that, when a taxpayer has two places of business, the taxpayer's home will be determined by considering (1) the length of time the taxpayer spends in each location; (2) the degree of the taxpayer's business activity in each place; and (3) the relative proportion of the taxpayer's income derived from each place.[3] If a taxpayer maintains his family residence at the minor place of business, travel from the principal place of business to the minor business location is considered to be travel away from his tax home when the primary purpose for the return to the location of his residence is business in nature.

A taxpayer does not necessarily lose his tax home when he works at a different location for a temporary period of time. However, if the stay is indefinite, the taxpayer may be considered to have changed his tax home. In determining whether a job is temporary or permanent, all facts and circumstances are considered. The Internal Revenue Service views a one-year or more stay as strongly indicating a presence beyond a temporary period.[4]

In general, the taxpayer's home includes the general area surrounding his regular place of business. Also, it is well settled that "away from home" includes only overnight trips or trips on which a stop for sleep is required.

C. Business versus Personal Expenses

Overview

Expenses incurred while away from home overnight are deductible only to the extent reasonable and necessary to the taxpayer's trade or business. Thus, it is necessary to distinguish business expenses from personal or family expenses. A taxpayer may not deduct as a business expense clothing, medical expenses, and charitable contributions, although medical expenses and charitable contributions may be deductible under other provisions of the Code. Clothing generally is considered a nondeductible personal expense.

Spouse's presence

In general, expenses attributable to the presence of a spouse (or other family member) are not deductible unless it can be shown adequately that the spouse's presence has a bona fide business purpose. The performance of some incidental service by the spouse or child does not constitute a bona fide business purpose.

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[1] *Commissioner* v. *Flowers*, 326 U.S. 465 (1946), *rev'g*, 148 F.2d 163 (5th Cir. 1945).
[2] Rev. Rul. 75–432, 1975–2 C.B. 60.
[3] *Markey* v. *Commissioner*, 490 F.2d 1249 (6th Cir. 1979), *rev'g* T.C. Memo 1972–154; *Blue* v. *Commissioner*, T.C. Memo 1982–486.
[4] Rev. Rul. 60–189, 1960–1 C.B. 60.

A business purpose does not include acting as a hostess at receptions,[5] or assisting in making business acquaintances.[6] Merely attending luncheons and dinners is not sufficient to establish a business purpose.[7] However, the court in *United States* v. *Disney*[8] held that the travel expenses of the wife of a corporation president are deductible if the dominant purpose of the wife's presence was to serve her husband's business purpose in making the trip and it was reasonable and necessary (and not merely helpful) for her to spend a substantial amount of her time assisting her husband in fulfilling that purpose. In holding that Mrs. Disney's presence was necessary to her husband's business on that trip, the court noted that if Mr. Disney had held a less powerful executive position, it would have considered the presence of the wife necessary only if employer insistence on her presence amounted to a condition of employment.

Incidental personal activity

The Internal Revenue Service has ruled that an employee can deduct not only his expenses for meals and lodging while making trips to and from a temporary post, but also expenses for meals and lodging for the entire time during which his duties prevent him from returning to his regular post of duty.[9] One court has held that a State Supreme Court Justice who was required to spend the 9-month court term away from home could deduct rent for an entire year since he was required to sign a 1-year lease to obtain an apartment for the 9-month year.[10] The court stated that there is no requirement that a person on business at a temporary post stay in a hotel or other transient residence.

Allocation between business and personal expenses

If a taxpayer's expenses while away from home are both business and personal, the taxpayer must make an allocation to determine what portions of the expenses are deductible. For example, if the taxpayer were unable to show a business purpose for the presence of a family member, the taxpayer would have to exclude that portion of the expenses attributable to the family member.

In general, the required allocation must be made on an incremental basis. For example, if a taxpayer stays in a hotel, the difference between a single rate and a multiple occupancy rate would be nondeductible. One court has held, though, that if a child is present in a rented apartment at a temporary business location for only a very short time (i.e., a few weekends and part of one month), no allocation is required since the apartment was not provided to supply the child with a place to stay.[11] Also, the court did not require an allocation for the wife's use of the apartment. It is unclear whether an allocation would have been required if the dwelling unit had been a house or large apartment. The size of the dwelling might indicate a nonbusiness purpose of providing lodging for

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[5] *See, Sheldon* v. *Commissioner,* 299 F.2d 48 (7th Cir. 1962), *aff'g,* T.C. Memo 1961-44.
[6] *See, Fenstermaker* v. *Commissioner,* T.C. Memo 1978-210.
[7] Rev. Rul. 56-168, 1956-1 C.B. 93.
[8] 413 F.2d 783 (9th Cir. 1969).
[9] Rev. Rul. 75-432, 1975-2 C.B. 60.
[10] *United States* v. *LeBlanc,* 278 F.2d 571 (5th Cir. 1960).
[11] *United States* v. *LeBlanc,* supra.

family members. With respect to meals, all costs attributable to the family member would be nondeductible.

Special limitations on personal use of residence

Prior to enactment of section 113 of the Black Lung Benefits Revenue Act of 1981 (Pub. L. 97-119), the application of the tax rules governing business use of a home (sec. 280A) [12] could have resulted in denial of lodging expenses otherwise deductible as traveling expenses. This denial of expense deductions could have occurred, for example, when a taxpayer who had purchased a condominium in an out-of-town location for use on frequent business trips was accompanied by family members on more than 14 days during the year.

D. Lavish or Extravagant Expenses

Under the general rule, business expenses must be ordinary and necessary to the conduct of business. For meals and lodging, which are listed as travel expenses included within the general rule, the statute specifically excludes expenses that are "lavish or extravagant under the circumstances."

E. Reimbursement

In general, amounts are not deductible to the extent they do not represent an actual out-of-pocket expense. Thus, an expense for which a taxpayer is entitled to reimbursement is not deductible. The courts have held that reimbursable expenses for which a taxpayer fails to request reimbursement generally are not considered necessary expenses and thus are not deductible by the taxpayer.[13]

The Internal Revenue Service has ruled that to the extent government officials can establish that they incurred unreimbursable expenses directly in connection with their official duties, out-of-pocket expenses may constitute a charitable contribution.[14] The courts have applied the same rule to out-of-pocket expenses for which reimbursement was available but not claimed because of a desire to make a donation to the charity.[15]

F. Substantiation

No deduction for travel expenses (including meals and lodging) is allowed unless the taxpayer substantiates the expenditures. In general, to meet the substantiation requirements, a taxpayer must maintain an account book, diary, statement of expense or similar record supported by documentary evidence such as receipts, paid bills, and cancelled checks. The records and documentary evidence must clearly establish the elements of each expenditure sought to be deducted, namely, the amount, time, place, and business purpose

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[12] Section 280A was enacted as part of the Tax Reform Act of 1976 to replace vague standards on which the courts and the Internal Revenue Service differed concerning the deductibility of expenses incurred in connection with use of the taxpayer's home in a trade or business or income producing activity or in connection with the rental of vacation homes and other residential real estate.

[13] *See, Coplon* v. *Commissioner,* 277 F.2d 534 (6th Cir. 1960), *aff'g,* T.C. Memo 1959-34; *Kennelly* v. *Commissioner,* 56 T.C. 936 (1971), *aff'd without opinion,* 456 F.2d 1335 (2nd Cir. 1972).

[14] *See,* Rev. Rul. 59-160, 1959-1 C.B. 59.

[15] *Wolfe* v. *McCaughn,* 5 F. Supp. 407 (E.D. Pa. 1933).

of the expense. The record of these elements must be made at or near the time of the expenditure. Documentary evidence is specifically required for lodging expenses and for any other expenditure of $25 or more. A written statement of the business purpose of an expenditure is generally required, unless such business purpose is evident from the facts and circumstances surrounding the expenditure.

Under certain circumstances, an employee reimbursed for travel by the employer under a subsistence or per diem arrangement is not required to substantiate the amount of the expense or report the reimbursement as income. To qualify, (1) the employee must adequately account to the employer, and (2) the reimbursement must not exceed actual business expenses. The adequate accounting requirement will be considered met if (1) the employer reasonably limits payments of travel expenses to those that are ordinary and necessary in the conduct of a trade or business, (2) the employee substantiates by records or other evidence the time, place, and business purpose of the travel, and (3) the reimbursement does not exceed the greater of $44 or the maximum Federal per diem applicable for the locality in which the travel occurs.[16]

The Internal Revenue Service will rule that an employer reasonably limits payments under an actual subsistence arrangement to ordinary and necessary expenses if the employer maintains adequate internal controls, such as requiring verification and approval of the expense account by a responsible person other than the employee. For per diem arrangements, the Internal Revenue Service must determine if the employer's travel allowance practices are based on reasonably accurate estimates of travel costs, including recognition of cost variances encountered in different localities. If the employer's reimbursement arrangement is considered to reasonably limit payments to ordinary and necessary expenses but the payment on any occasion exceeds deductible business expenses, the employee must report the excess as income. If the taxpayer wants to deduct actual expenses exceeding the reimbursement, the employee must include the reimbursement in income and substantiate all deductions.

[16] Rev. Rul. 80-62, 1980-1 C.B. 63, as modified by Rev. Rul. 80-203, 1980-2 C.B. 101.

III. HISTORICAL DEVELOPMENT OF RULES AFFECTING MEMBERS OF CONGRESS

A. Overview

Like other businessmen, Members of Congress may deduct ordinary and necessary business expenses, including travel expenses incurred while away from home overnight in the pursuit of a trade or business. In general, the same limitations on deductibility applicable to other businessmen apply to Members of Congress.

The rules with respect to Members of Congress have, at various times, been explicitly provided by statute in three areas: (1) the determination of their tax homes, (2) the maximum amount deductible as living expenses in Washington, and (3) the rules relating to substantiation of Washington expenses. Present law provides expressly that the tax home of a Member of Congress is the Member's place of residence within the home State or district. Additionally, the amount deductible as living expenses in Washington may not exceed $3,000. Present law contains no special provision regarding substantiation of Washington expenses by Members of Congress.

B. Tax Home and Limitations on Deductions

Prior to 1952, the Board of Tax, Appeals in *George W. Lindsay* [17] had held that, on the facts of that case, the home of that Member of Congress was Washington, D.C. The Court based its conclusion largely on the fact that, under then existing law, the official duties of Members of Congress were to be performed in Washington, D.C.

In 1952, Congress amended the Code to provide a uniform rule under which the tax home of any Member of Congress would be considered his or her residence within the home State or district (Pub. L. No. 83-178).[18] However, under the amendment, a Member could deduct only $3,000 of living expenses incurred in Washington, D.C.

The legislative history of the 1952 amendment and the case law suggest that the amendment did not waive the requirement that the trip must include an overnight stay.[19] Under this interpretation, a Member who commuted to Washington from the home State

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[17] 34 B.T.A. 840 (1936).

[18] Prior to the Tax Reform Act of 1976, there was no special rule for ascertaining the location of a State legislator's tax home. As a result, the generally applicable rules, described above, determined the location of a State legislator's tax home. In general, the courts held that if a State legislator who has no other trade or business is required to spend most of his working time at the State capitol, that area is considered to be his principal post of duty and, under the principal place of business test, his tax home. *Montgomery* v. *Commissioner*, 532 F.2d 1088 (6th cir. 1976), *aff'g*, 64 T.C. 175 (1975). Present law allows a State legislator to elect, for any taxable year, to treat his residence within the legislative district as his or her tax home for purposes of computing the deduction for expenses.

[19] *See*, 98 Congressional Record 5280 (1952); *Chappie* v. *Commissioner*, 73 T.C. 823, 831 (1980).

on a daily basis and did not stay in Washington overnight could not deduct travel expenses (e.g., meals and transportation). Those expenses would be treated as nondeductible personal commuting expenses.[20] It was unclear whether a Member who lived within commuting distance of Washington but stayed overnight in Washington could deduct travel expenses. The Internal Revenue Service takes the position that a person's tax home is the general area surrounding the person's abode.[21] If the Members' place of residence within the home State was within commuting distance of Washington, Washington might be considered within the area of the Member's home. Under that interpretation, travel expenses could be denied even if the Member stayed overnight in Washington.

C. Recent Legislative Actions

In 1981, Congress enacted several further changes affecting the deductibility of travel expenses of Members of Congress. As part of the First Continuing Resolution, Congress repealed the $3,000 cap on the deduction of a Member's living expenses in Washington, D.C.

The Black Lung Benefits Revenue Act of 1981 also made changes affecting the deductibility of travel expenses of Members of Congress. For all taxpayers, including Members of Congress, the Act makes clear that the rules under section 280A disallowing lodging costs in connection with business use of a home do not apply with respect to travel expenses allowable under section 162(a)(2) (or any deduction that meets the tests of that section but is allowable under a different section). Also, the Act added a provision requiring Treasury to prescribe amounts deductible as travel expenses by Members of Congress without substantiation. Under the Act, Treasury could not prescribe an amount in excess of an amount determined to be appropriate under the circumstances.

Pursuant to the Black Lung Benefits Revenue Act of 1981, the Treasury Department issued regulations in temporary and proposed form prescribing amounts deductible by Members of Congress without substantiation. In general, the regulations allowed Members of Congress to elect to deduct a designated amount as travel expenses for each Congressional day in the year in lieu of substantiating their actual travel expenses. The amount deductible was determined by reference to the maximum amount of reimbursement available to a government employee traveling to Washington, D.C., which at the time was $75. The number of Congressional days for a Member was the number of days in the taxable year less the number of days in periods in which the Member's Congressional chamber was not in session for 5 consecutive days or more (including Saturday and Sunday).

In 1982, Congress reversed two of the major changes made in 1981 affecting the deductibility of travel expenses of Members of Congress. As part of the Urgent Supplemental Appropriations Act of 1982, Congress restored the $3,000 cap on the deductibility of

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[20] Although a deduction for meals while in Washington might not be allowed as a travel expense under section 162(1)(2) the cost of business meals in surroundings generally conducive to business discussions would be deductible under general business expense rules.

[21] Rev. Rul. 190, 1953-2 C.B. 303.

living expenses incurred by Members of Congress in the Washington, D.C. area for business purposes. The Act also eliminated the special rule permitting Members to deduct a designated amount for travel expenses in lieu of substantiation. The rule designating as the tax home of a Member of Congress the member's residence within the home state or district remained in effect. Congress also retained the 1981 amendment to section 280A that affects the deductibility of expenses incurred in connection with business use of a home.

The provisions of the Urgent Supplemental Appropriations Act of 1982 affecting deductibility of travel expenses of Members of Congress were made effective for taxable years beginning after December 31, 1981. As a result, the changes made in 1981 (no cap on deductions and amounts deductible without substantiation) were effective only for the year 1981.

IV. DESCRIPTION OF THE BILL (S. 70)

Explanation of Provisions

The bill would repeal all rules expressly governing the deductibility of travel expenses by Members of Congress. The bill would repeal the rule designating as the tax home of a Member of Congress the Member's residence within the home State or district. The determination of a Member's tax home would be made on a case-by-case basis under the general principles applicable to all taxpayers. The bill would repeal the $3,000 cap on the deductibility of living expenses incurred by Members of Congress in the Washington, D.C. area for business purposes. The amount deductible as travel expenses by each Member would be determined in accordance with the general principles applicable to all taxpayers, including the rules regarding substantiation of business expenses. The bill would retain the 1981 amendment to section 280A that affects the deductibility of expenses by all taxpayers incurred in connection with the business use of a home.

The bill would not affect the liability of Members of Congress for State and local taxes.

Effective Date

The bill would apply to taxable years beginning after December 31, 1982.

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